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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network	)	CC Docket No. 88-57

COMMENTS OF CYPRESS COMMUNICATIONS, INC.

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COMMENTS OF CYPRESS COMMUNICATIONS, INC.

Cypress Communications, Inc. ("Cypress") hereby submits its comments in response to the Commission's October 25, 2000 Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

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[1] *Promotion of Competitive Networks in Local Telecommunications Markets,* First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57 (rel. October 25, 2000), 66 Fed. Reg. 2,322 (2001) (to be codified at 47 C.F.R. pt. 1, 64 and 68) ("*Order and Further NPRM*").

I. Introduction and Summary

Cypress is a publicly traded communications provider formed in 1995 and headquartered in Atlanta, Georgia. The company provides a full range of communications services in commercial buildings in competition with incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs"). Cypress provides these services over its fiber-optic, copper and coaxial systems that are installed in commercial buildings. These systems include riser and other cable and routing and distribution equipment. The routing and distribution equipment include routers and voice and data switches that connect Cypress's riser systems to the networks of select network service providers.

Using Cypress's network provides commercial tenants with state-of-the-art communications services and provides building owners with a marketing advantage in attracting and retaining tenants. Cypress has negotiated with building owners the right to install in-building systems in approximately 1,000 buildings in more than 50 metropolitan areas.

In the Commission's *Order and Further NPRM* regarding access to multi-tenant environments ("MTEs"), the Commission adopted several measures intended to promote competitive access to MTEs. These measures include: (1) prohibiting carriers from prospectively entering into exclusive agreements with building owners that restrict or effectively restrict building owners from granting access to other carriers; (2) clarifying control of in-building wiring; and (3) interpreting Section 224 of the Communications Act to include access to utility conduits and rights-of-way in MTEs.[2]

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[2] *Id.* at ¶ 1.

In its *Further NPRM*, the Commission seeks comment on whether it should take additional steps to promote access to MTEs. As a general matter, Cypress believes the Commission needs to tread lightly in imposing rules on the MTE marketplace and should intrude only where it is necessary to offset the demonstrated market power of participants.

Cypress, in these comments, focuses on two issues raised by the *Further NPRM*. First, in response to the Commission's request for comment on whether it should impose a nondiscriminatory access requirement for access to MTEs, Cypress believes that the Commission should adopt a rule that ILECs cannot enjoy discriminatory access to MTEs. Such a rule is necessary because ILECs have market power and therefore possess an advantage over CLECs. Cypress believes, however, that a nondiscrimination requirement is unnecessary vis-à-vis CLECs, because these carriers lack market power and building owners do not have an incentive to discriminate on CLECs' behalf.

Second, the Commission should not regulate preferential arrangements. Any attempt by the Commission to regulate the full array of preferential arrangements would be unworkable. However, if the Commission does ban preferential arrangements, it should only do so prospectively, and it should only ban exclusive preferential arrangements. Non-exclusive preferential arrangements are available to all carriers and therefore do not pose a threat to competition.

II. Nondiscriminatory Access to Buildings

For competition to succeed, telecommunications carriers must compete on an equal footing. However, when it comes to fees for access to MTEs, the ILECs have a clear leg up on their CLEC competitors. Cypress's experience is that ILECs generally do not

pay fees for building access.[3] By contrast, CLECs generally pay building owners an access fee based on a percentage of revenues generated from serving tenants in a building. The Commission should adopt a rule prohibiting ILECs from enjoying such discriminatory access.

On the other hand, the Commission need not adopt a requirement preventing building owners from discriminating in favor of Cypress and other competitive carriers. Competitive carriers lack the market power to demand preferential treatment from building owners and building owners do not have an incentive to discriminate in favor of Cypress or other competitive carriers. Moreover, as a factual matter, Cypress has not received preferential treatment from building owners because of its relationship with them. Thus, from both a theoretical perspective and as a matter of experience, a nondiscrimination requirement is simply not necessary vis-à-vis building owners and CLECs.

A. The Commission Should Not Allow ILECs to Enjoy Discriminatory Access

Because ILECs are the entrenched and dominant providers of local exchange service, they are in a position to refuse demands by building owners for access fees. An owner, faced with the prospect of a large group of unhappy tenants if it forces out the ILEC for non-payment of fees, will be generally inclined to back off its demand for fees.

[3] WinStar flagged this issue in 1997 when its Vice President for Real Estate stated that building owners are requesting fees from CLECs that are not imposed on ILECs. *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 14 FCC Rcd 12673, at ¶ 31 ("Initial NPRM"). It is unclear whether building owners are not attempting to assess fees or whether ILECs are simply refusing to pay, but Cypress believes that the latter frequently is the case.

The result is that CLECs generally pay fees and ILECs generally do not. This confers a cost advantage on the ILECs in competing for tenant customers, a cost advantage due solely to the ILECs' incumbent status and market dominance. The Commission has long recognized that for competition to function effectively, carriers must compete on an equal playing field. For example, the Commission required Verizon to establish an advanced services affiliate as a condition to obtaining authorization to provide in-region interLATA service in the state of New York. The Commission noted that the benefit of such an affiliate is that it "should ensure a level playing field between the BOC and its advanced services competitors."[4]

Because CLECs must compete with ILECs for tenants' business, the ILECs' access fee cost advantage places the CLECs in a no-win situation. CLECs must either absorb the cost of all or part of the fees or set higher rates. To the extent that CLECs absorb the cost, their profit margins will suffer and they ultimately will find it more difficult to generate or attract capital to finance expansion of its network and operations. If the CLECs set higher rates, they risk losing tenant customers to the ILEC that is under no access fee related cost pressure to raise prices.

The problem will be compounded if the building owner decides to recover from CLECs its overhead and other costs of providing building access to the ILEC. For example, consider a building owner whose cost of providing access to all LECs in a particular building is $50,000 per year, and the ILEC-related portion of that cost is $25,000. Given the dominant bargaining power of the ILEC, the owner may decide to recover the entire $50,000 from the CLECs. Because CLECs lack the market power of an

[4] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 at ¶ 332 (1999).

ILEC, they may have to pay such excessive fees in order to gain access to prospective customers in the building. Accordingly, without a nondiscrimination requirement, CLECs are not only at a cost disadvantage compared to the ILEC, but may also have to pay access fees significantly above the cost to the building owner of providing them with access in order to make up for the fact that the ILEC is receiving a free ride courtesy of its market power.

From an economic perspective this creates two problems. First, because ILECs and CLECs do not compete on a level playing field the low cost producer may not be the carrier that ultimately winds up serving the building's tenants. Second, the fact that CLECs are sometimes being charged above cost rates for building access implies that in some instances CLECs will decide not to serve buildings that they would have served had building access rates been aligned with the cost of providing such access.

To promote competition between ILECs and CLECs, the Commission should remove the ILECs' unfair fee-related cost advantage. The disparity in the access fees paid by ILECs and CLECs perpetuates the ILEC monopoly legacy to the detriment of competition and contrary to the express purpose of the 1996 Act. Accordingly, the Commission should assert its jurisdictional reach, and mandate a policy under which building owners cannot discriminate in favor of ILECs. Under such a mandate, ILECs and CLECs would deal with building owners on an equal footing. As for the mechanics of enforcing a nondiscriminatory policy, Cypress endorses the approach outlined in the comments filed by CompTel in the initial NPRM which places the burden on the ILECs to not accept preferential treatment from building owners.[5]

[5] Comptel Comments filed August 26, 2000 in response to the *Initial NPRM*, at 13-21.

B. The Commission Need Not Impose a Nondiscriminatory Access Requirement on CLECs or BLECs

Unlike ILECs, Cypress and other CLECs do not have the market power to extract preferential treatment from building owners. In particular, the relationship between Cypress and building owners does not create an incentive for building owners to discriminate in favor of Cypress. Cypress and other so-called building LECs ("BLECs") have in the past granted building owners stock warrants in order to obtain quick access to their blocks of buildings and bring the benefits of competition to tenants earlier than otherwise would have been the case.

The Smart Buildings Policy Project has argued in an *ex parte* filing that building owners have an incentive to discriminate in favor of carriers in which they maintain a financial relationship.[6] The Smart Buildings Policy Project even names Cypress as an example of such a carrier.[7] The Smart Buildings Policy Project, however, fails to support its contention with a detailed analysis. It simply assumes that if a building owner has a financial interest in a carrier, that building owner has an incentive to discriminate in favor of the carrier.[8]

Building owners holding warrants would not likely benefit from discriminating in favor of Cypress. To begin with, it is unlikely that a building owner, acting alone, can move Cypress's stock price upward by discrimination in favor of Cypress. Cypress's operations are spread among too many buildings and the likelihood that the owner of any group of such buildings could meaningfully increase Cypress's overall profitability through discriminatory action is remote. A building owner would not refuse a tenant's request to

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6 *Ex parte* filed by Smart Building Policy Project on August 1, 2000.

7 *Id.* at 1-2.

8 *Id.* at 3.

use a Cypress competitor, and force that tenant to use Cypress's services on the remote likelihood that such action will marginally promote the value of the building owner's warrants to purchase Cypress stock.[9]

The facts support Cypress's contention that building owners do not have an incentive to discriminate on Cypress's behalf. Cypress does not receive special treatment from building owners who hold an equity interest in Cypress. Cypress typically pays building owners a percent of the revenues it receives from serving a building's tenants regardless of whether Cypress has granted the building owner warrants. Moreover, the non-price terms in Cypress's contracts with building owners with whom it has a financial relationship are substantially similar to the non-price terms contained in the contracts negotiated with other building owners. If anything, this suggests that Cypress is treated less favorably by those owners to whom it provides warrants since in order to gain building access it is paying the typical access fee in addition to granting the owner stock warrants. The warrants were simply a price Cypress was willing to pay to gain early access to blocks of buildings, and are not a tool to exclude or hinder competitors from gaining access.[10]

The Commission might do real harm by extending a nondiscrimination requirement vis-à-vis CLECs. While discrimination in favor of ILECs is likely the result of ILECs flexing their market power, discrimination in favor of a particular CLEC may very

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[9] As information, Cypress's stock, like the stock of many other publicly traded CLECs, has decreased dramatically. Cypress's stock, which traded at a 52-week high of $29.92, had a closing price of $1.09 on January 19, 2001.

[10] Also, there is little difference between building owners obtaining stock warrants in BLECs in exchange for access and building owners acquiring stock in CLECs/BLECs on the open market. To the extent that the Commission believes that it should refrain from examining the investment decisions of each building owner to determine whether the building owner has an incentive to discriminate in favor of a particular LEC, the Commission should refrain from adopting rules governing a building owner's stock warrants in a BLEC.

well reflect real economic factors. For example, a building owner may charge CLEC 'A' more for access than CLEC 'B' because of the fact that it is more expensive for the building owner to provide access to CLEC 'A' (or because the building owner offers more marketing support to CLEC 'A'). If the Commission banned discrimination in this instance it would be adopting a rule that prevented the price of access from reflecting the cost of access; this would decrease economic efficiency. Accordingly, the Commission should only ban discrimination in favor of ILECs since this type of discrimination is primarily the result of the ILECs' historical role as the monopoly provider of telephone service.

Imposing a nondiscrimination requirement with respect to the relationship between ILECs and building owners, while not doing so with respect to CLECs and building owners is consistent with the statutory scheme of the 1996 Act. Under the 1996 Act, not all LECs are treated equally. For example, Section 251(c) sets forth ILEC obligations, such as unbundled access, that do not apply to CLECs. Similarly, Section 271 restricts Bell Operating Companies, but not other ILECs, from providing in-region interLATA services absent FCC approval. This disparity in treatment of LECs clearly stems from the recognition that ILECs possess market power via their control of bottleneck facilities while CLECs do not. Accordingly, targeting ILECs and not CLECs with a nondiscrimination requirement in recognition of ILECs' market power is consistent with the 1996 Act and FCC rules and policies.

III. The Commission Should Not Regulate Preferential Arrangements

The Commission is seeking comment on whether to ban "preferential arrangements" in commercial buildings. *Order and Further NPRM* at ¶¶ 165-68. As a threshold matter, the Commission does not define what it means by preferential

arrangements. The Commission observes only that, "several commenters briefly address various preferential building owner/LEC relationships, such as exclusive marketing arrangements or bonuses given by landlords to tenants who subscribe to the services of particular competitive LECs." *Order and Further NPRM* at ¶ 165. The Commission also notes that Qwest argues that "'[a]n arrangement that is not technically 'exclusive' may in fact have the practical effect of being exclusive, if the building owner refuses to make the same arrangement available to other carriers.'" *Order and Further NPRM* at ¶ 165.[11]

With respect to Qwest's proposed definition of preferential arrangements, the Commission has already banned exclusive arrangements prospectively as well as arrangements that are de facto exclusive.[12] If the Commission is concerned with arrangements that have the effect of being exclusive, the Commission has already addressed the problem. Similarly, the Commission suggests that some preferential arrangements may be discriminatory. To the extent that this is the case, the Commission can deal with those arrangements with its proposed rules to ensure nondiscriminatory access.

If the Commission is instead concerned with arrangements under which carriers contract with building owners for certain marketing benefits, such as tenant lists or the opportunity to make presentations to tenants in the building lobby, attempting to draw a

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[11] Quoting Qwest Reply Comments at 11. The comments were filed in *Promotion of Competitive Networks in Local Telecommunications Markets,* Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999).

[12] *Order and Further NPRM* at ¶ 37. With regard to the issue of exclusive access, Cypress would not object if the Commission prohibited carriers from enforcing exclusive access provisions in existing contracts Nevertheless, the Commission may wish to refrain from disturbing existing contractual arrangements, and allow those arrangements to run their course. In Cypress's experience, CLEC agreements with building owners typically run for a period of five years with an option to renew for another five years.

meaningful line between what is and is not permissible among an almost limitless variety of arrangements would be a misguided and impossible task.

The Commission need not and should not involve itself in the regulatory morass of attempting to decide which benefits contracted for by building owners are acceptable. Unlike situations where exclusive access is granted to one carrier and other carriers are barred from the building, preferential agreements do not deny CLECs access to a bottleneck; all that is at issue are the specific terms that building owners and individual carriers have negotiated. Under these circumstances, regulation is inappropriate.

However, if the Commission does decide to ban preferential arrangements, it should define these arrangements such that only *exclusive* preferential arrangements, such as exclusive marketing arrangements, are prohibited. A broader definition would be an unnecessary intrusion into the marketplace and would prevent private parties from contracting in a manner that maximizes efficiency to the benefit of consumers.

For example, Cypress has entered into agreements that provide for *non-exclusive* marketing arrangements that require building owners to perform one or more of the following tasks: (i) notify Cypress of the arrival of a new tenant; (ii) provide Cypress with tenant lists; (iii) use reasonable efforts to advise existing, new or prospective tenants of the availability of Cypress's services; (iv) allow Cypress to host promotional events in a suitable location in the building; and (v) permit Cypress to leave marketing materials in the leasing office.

These arrangements simply ensure that the building's tenants are made aware of Cypress and the availability of Cypress's services within the building; they do not prevent other competitors from entering into similar arrangements with building owners. This is significant since the Commission has recognized "that individually negotiated contracts are

not unreasonably discriminatory if their terms are made generally available to other similarly situated customers willing and able to meet the contract's terms."[13]

Moreover, if a carrier does not wish to enter into this type of non-exclusive marketing agreement, it can create tenant awareness of its services through advertising, use of sales representatives and other means. Accordingly, non-exclusive marketing agreements do not confer Cypress with a unfair competitive advantage over other carriers. If anything, they enhance competition by providing tenants with information on rates and service.

Finally, regardless of whether the Commission prohibits preferential arrangements prospectively, the Commission should not do so retroactively because it would disrupt established commercial arrangements. Cypress and other carriers have invested significant sums under the reasonable assumption that they would obtain the benefit of the terms they negotiated. To deny carriers these marketing benefits after they have paid for them would be unwarranted and a blow to competition.

IV. Conclusion

The Commission should not intrude in the marketplace unless there is the clear need to offset the demonstrated market power of a participant. The ILECs have such market power and are exercising that market power to gain unfair advantages in the area of fees for building access. The Commission should level the playing field by barring ILECs from enjoying lower building access fees than their competitor LECs must pay. For LECs that lack market power, there is no need for the Commission to impose a nondiscrimination requirement.

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13 *Panamsat Corporation v. Comsat Corporation – Comsat Worldsystems,* Memorandum Opinion and Order, 12 FCC Rcd 6952, n.94 (1997).

The Commission should not prohibit preferential arrangements, since such arrangements provide CLECs with valuable marketing tools. If the Commission for some reason did choose to ban preferential agreements, at a minimum it should define such agreements narrowly so that only truly *exclusive* preferential agreements are prohibited.

Respectfully submitted,
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Dated: January 22, 2001

CERTIFICATE OF SERVICE

I Candace Harris, do hereby certify that on this 22th day of January 2001 a true and correct copy of Cypress Communications, Inc.'s Comments in WT Docket No. 99-217 and CC Docket Nos. 96-98, 88-57 were served on the following by hand delivery:

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